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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES E. CAREY,

Defendant and Appellant.

2d Crim. No. B209680
(Super. Ct. No. F415412)
(San Luis Obispo County)

Charles E. Carey appeals from the judgment entered following his no contest plea to one count of continuous sexual abuse of a child. (Pen. Code, § 288.5.) Appellant contends that the trial court erred when it selected the middle term sentence of 12 years in state prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant married K.F.'s mother when K.F. was two years old. He began molesting K.F. when she was thirteen. He continued until he was discovered, just after she turned fourteen.

K.F. saw appellant as a "good step dad and a really nice guy." She submitted to the abuse because "she was scared and she did not want to ruin her mother's marriage." "[S]he did not know what to do." "[S]he was scared and she did

not know whom to tell." Appellant admitted that he molested K.F. He recognized that K.F. was too scared to say anything.

Appellant was charged with one count of continuous sexual abuse of a minor and one count of committing a lewd act upon a child. (§ 288, subd. (c)(1).) Appellant pled guilty to the first count in exchange for dismissal of the second and an agreed upon sentence of either the 6-year low term or the 12-year midterm.

The court selected the 12-year midterm, rejecting a low term recommendation by the probation officer. In aggravation, the court found that the victim was particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)) and that defendant took advantage of a position of trust and confidence. (Rule 4.421(a)(11).) In mitigation, the court found that appellant had no prior record and that he had acknowledged his guilt early and voluntarily. The court explained, "I looked at particularly the position of trust that you held with this young girl and her vulnerability The mere fact that you did it was a threat to her because she knew that once she disclosed everything was going to fall apart. She is smart enough to know that, and it has." Appellant did not object to dual use of facts.

DISCUSSION

Appellant contends that the finding of vulnerability was based on improper dual use of facts.¹ The contention was waived and is without merit.

Appellant's challenge to the court's selection of sentence was waived by his failure to object at the sentencing hearing. "[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) The waiver rule applies to complaints that "the court purportedly

¹This challenge to the court's exercise of sentencing discretion is authorized without a certificate of probable cause because it does not challenge the validity of the plea. (Cal. Rules of Court, rule 8.304; *People v. French* (2008) 43 Cal.4th 36, 45.)

erred because it double-counted a particular sentencing factor." (*Id.* at p. 353.)

These "[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id.* at p. 353.)

Appellant argues that the waiver rule should not apply because he was not given a meaningful opportunity to object. A meaningful opportunity to object exists where, "the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices." (*Id.* at p. 356.) The record reflects that the trial court clearly apprised the parties of its intended sentence and supporting reasons.

Even if appellant's challenge had not been waived, we would affirm the sentence. We review a court's sentencing determination for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A court abuses its discretion if it relies on circumstances that are an improper basis for decision. (*Ibid.*)

No authority requires a finding of factors in aggravation to impose a midterm sentence. Although the midterm is no longer the presumptive sentence, amendments to the sentencing rules have also eliminated the requirement that selection of a greater term be supported by aggravating factors that outweigh mitigating factors. (Cal. Rules of Court, rule 4.420(b), as amended May 23, 2007.) The court now has discretion to select any of the three terms and "may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (Rule 4.420(b).) Any sentence was authorized within the negotiated range, so long as the court did not abuse its broad sentencing discretion.

Appellant is correct that the court improperly relied upon the victim's age and appellant's status as stepfather to find vulnerability. Both facts were used for other purposes. "A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term." (Cal. Rules of Court, rule 4.420(d).) The victim's age was used to prove the offense. Where minority is an element of the charged offense, youth alone may not be used as a factor in

aggravation (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 680), unless the victim is extremely young. (*People v. Ginese* (1981) 121 Cal.App.3d 468, 477.) Appellant's status as stepfather was used to support a finding that his position of trust helped him commit the offense. Abuse of the paternal relationship can represent only one aggravating factor. (*Fernandez*, at p. 680.)

Respondent contends that other facts supported vulnerability, because K.F. was afraid of destroying her mother's marriage. To support a finding of vulnerability, facts must indicate that the victim is vulnerable "'in a special or unusual degree.'" (*People v. Clark* (1990) 50 Cal.3d 583, 638.) K.F.'s fear of destroying her mother's marriage cannot be meaningfully distinguished from the fact that appellant was K.F.'s stepfather. The fact that she was molested when she was alone at home with appellant did not render her more vulnerable than any 13-year-old who is continuously sexually abused by a parent.

Dual use of facts to support vulnerability did not render the sentence an abuse of discretion, because the court properly relied on appellant's use of his position of trust to commit the offense. Appellant concedes that his position of trust was an aggravating factor. Even before the 2007 amendment to rule 4.420 of the California Rules of Court, only a single aggravating factor was required to impose an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Dual use of facts does not necessitate resentencing if it is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error. (*Ibid.*) The trial court's remarks on the record persuade us that it is not reasonably probable it would have imposed a more favorable sentence in the absence of a vulnerability finding. The sentence is supported by the valid finding that appellant used his position of trust to commit the offense.

Appellant argues the case should be remanded based on language in *People v. Flores* (1981) 115 Cal.App.3d 924, 927, requiring remand where dual use of facts rendered two of three aggravating factors (age and vulnerability) improper.

That case involved imposition of an upper term sentence before the 2007 amendments. The molester did not enjoy a position of trust or confidence. In this case it is not reasonably probable that the trial court would have imposed the lesser term upon remand.

DISPOSITION

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Ginger E. Garrett, Judge
Superior Court County of San Luis Obispo

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and Appellant.

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